

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 943 of 2007

BONIFACE MUTUA KITUNGUAPPELLANT

V E R S U S

PETER MWAURA KAMAU

T/a MWAURA KAMAU & CO. ADVOCATE.....RESPONDENT

R U L I N G

The background of this matter is as follows- On 13th February 2007 the lower court granted to the Appellant, *ex parte*, leave to file suit as a pauper. On 16th October, 2007 the lower court set aside that *ex parte* order to enable the application for leave to file suit as a pauper to be canvassed *inter partes*. On 16th November, 2007 the Appellant, being dissatisfied with that order, appealed against the same herein. At the same time he applied by notice of motion of the same date seeking the following main orders:-

- (i) that he be allowed to file the application and the appeal as a pauper;
- (ii) that the appeal, which was filed out of time by one day, be admitted out of time, and
- (iii) that there be stay of execution of the order appealed against pending disposal of the appeal.

I have considered the submissions of the Appellant, who is in person, and those of the Defendant's learned counsel. As already observed, the order of the lower court appealed against merely set aside an order that had been granted *ex parte* (apparently without service upon the opposite party) in order to facilitate the hearing *inter partes* of the application that had given rise to the order. In these circumstances the appropriate course of action that the Appellant should have taken was to prosecute *inter partes* his said application before the lower court. Where an applicant is seeking the indulgence of the court, such as the Appellant has done, he must demonstrate that the appeal that he has filed was the most expeditious and appropriate course that he could have taken. In the circumstances of this case, the appeal is totally unnecessary. There is no reason why the Respondent should be put to the expense of defending the appeal, especially where the Appellant is seeking to file the appeal as a pauper.

I will therefore refuse the application with costs to the Respondent. Having done so, the appeal now before the court, which was filed one day out of time, is not properly before the court. It is hereby struck out. Parties will bear their own costs of the appeal. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JANUARY, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 25TH DAY OF JANUARY, 2008